

U.S. District Judge Barbara J. Rothstein

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

D.S. by and through her next friend
TARA URS; D.Y. by and through his
next friend JULIE KELLOGG-
MORTENSEN; H.A. by and through
his next friend KRISTEN BISHOPP;
and DISABILITY RIGHTS
WASHINGTON, a nonprofit
membership organization for the
federally mandated Protection and
Advocacy Systems,

Plaintiffs,

v.

WASHINGTON STATE
DEPARTMENT OF CHILDREN,
YOUTH, AND FAMILIES; and ROSS
HUNTER, in his official capacity as
Secretary of the Washington State
Department of Children, Youth, and
Families,

Defendants.

CASE NO. 2:21-cv-000113

**AGREEMENT REGARDING
DISCOVERY OF
ELECTRONICALLY STORED
INFORMATION AND ORDER**

The parties hereby stipulate to the following provisions regarding the discovery of
electronically stored information (“ESI”) in this matter:

1 **A. General Principles**

2 1. An attorney's zealous representation of a client is not compromised by conducting
3 discovery in a cooperative manner. The failure of counsel or the parties to litigation to cooperate
4 in facilitating and reasonably limiting discovery requests and responses raises litigation costs and
5 contributes to the risk of sanctions.

6 2. As provided in LCR 26(f), the proportionality standard set forth in Fed. R. Civ. P.
7 26(b)(1) must be applied in each case when formulating a discovery plan. To further the
8 application of the proportionality standard in discovery, requests for production of ESI and related
9 responses should be reasonably targeted, clear, and as specific as possible.

10 **B. ESI Disclosures**

11 Within 30 days of entry of this Order, or at a later time if agreed to by the parties, each
12 party shall disclose:

13 1. Custodians / End Users. The ten custodians or end users most likely to have
14 discoverable ESI in their possession, custody, or control. The custodians or end users shall be
15 identified by name, title, connection to the instant litigation, and the type of the information under
16 the custodian or end user's control and shall include, for each named Plaintiff, at least one end
17 user with firsthand knowledge of each Plaintiff (e.g., an assigned casework or caseworker's
18 manager).

19 2. Non-custodial Data Sources. A list of non-custodial data sources (e.g., shared
20 drives, servers), if any, likely to contain discoverable ESI.

21 3. Third-Party Data Sources. A list of third-party data sources, if any, likely to
22 contain discoverable ESI (e.g., third-party email providers, mobile device providers, cloud
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1 storage) and, for each such source, the extent to which a party is (or is not) able to preserve
2 information stored in the third-party data source.

3 4. Inaccessible Data. A list of data sources, if any, likely to contain discoverable ESI
4 (by type, date, custodian, electronic system or other criteria sufficient to specifically identify the
5 data source) that a party asserts is not reasonably accessible under Fed. R. Civ. P. 26(b)(2)(B).

6 **C. ESI Discovery Procedures**

7 1. On-site inspection of electronic media. Such an inspection shall not be required
8 absent a demonstration by the requesting party of specific need and good cause or by agreement
9 of the parties.

10 2. Search methodology. The parties shall timely confer to attempt to reach agreement
11 on appropriate search terms and queries, file type and date restrictions, data sources (including
12 custodians), and other appropriate computer- or technology-aided methodologies, before any such
13 effort is undertaken. The parties shall continue to cooperate in revising the appropriateness of the
14 search methodology.

15 a. Prior to running searches:

16 i. The producing party shall disclose the data sources (including
17 custodians), any file type and date restrictions, and any other methodology that it proposes to use
18 to locate ESI likely to contain responsive and discoverable information.

19 ii. The parties will exchange proposed search terms and queries and
20 cooperate in good faith to reach agreement.

21 iii. The producing party may provide unique hit counts for each
22 proposed search term and query.

iv. The parties will meet and confer in good faith about the producing party's proposed data sources (including custodians), any file type and date restrictions, and any other methodology that it proposes to use to locate ESI likely to contain responsive and discoverable information, as well as about the search terms and queries proposed by the propounding party.

v. The following provisions apply to search terms / queries of the requesting party. Focused terms and queries should be employed; broad terms or queries, such as product and company names, generally should be avoided. A conjunctive combination of multiple words or phrases (*e.g.*, "computer" and "system") narrows the search and shall count as a single search term. A disjunctive combination of multiple words or phrases (*e.g.*, "computer" or "system") broadens the search, and thus each word or phrase shall count as a separate search term unless they are variants of the same word. The producing party may identify each search term or query returning overbroad results demonstrating the overbroad results and a counter proposal correcting the overbroad search or query.

b. After production: Within 21 days of the producing party notifying the receiving party that it has substantially completed the production of documents responsive to a request, the receiving party may request no more than 10 additional search terms or queries. The immediately preceding section (Section C(2)(a)(v)) applies.

c. Upon reasonable request and to the extent it is not unduly burdensome, a party shall disclose information relating to network design, the types of databases, database dictionaries, the access control list and security access logs and rights of individuals to access the system and specific files and applications, the ESI document retention policy, organizational

1 chart for information systems personnel, or the backup and systems recovery routines,
2 including, but not limited to, tape rotation and destruction/overwrite policy.

3 3. Format.

4 a. ESI will be produced to the requesting party with searchable text, in a
5 format to be decided between the parties. Acceptable formats include, but are not limited to, native
6 files, single-page Group IV TIFFs or JPGs with load files for e-discovery software that includes
7 metadata fields identifying natural document breaks and also includes document-level companion
8 OCR and/or extracted text files.

9 b. Unless otherwise agreed to by the parties, files that are not easily converted
10 to image format, such as spreadsheet, database, audio, video, and drawing files, will be produced
11 in native format. When a native file exists, parties agree that they will produce the native file,
12 and not a PDF in lieu of the native file.

13 c. Each document image file shall be named with a unique number (Bates
14 Number). File names should not be more than twenty characters long or contain spaces. When a
15 text-searchable image file is produced, the producing party must preserve the integrity of the
16 underlying ESI, *i.e.*, the original formatting, the metadata (as noted below) and, where applicable,
17 the revision history.

18 d. If a document is more than one page, the unitization of the document and
19 any attachments and/or affixed notes shall be maintained as they existed in the original document.

20 e. The parties shall produce their information in the following format: single-
21 page images of at least 300 dpi resolution and associated multi-page text files containing extracted
22 text or with appropriate software load files containing all information required by the litigation
23 support system used by the receiving party. Page size shall be 8.5 x 11 inches, unless in the
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1 reasonable judgment of the producing party, a particular item requires a different page size. Each
2 image file will use the Bates number of the page as its unique file name. Original document
3 orientation as displayed in the native file should be maintained in the TIFF image (i.e., portrait to
4 portrait and landscape to landscape).

5 f. The full text of each electronic document shall be extracted (“Extracted
6 Text”) and produced in a single, multipage text file containing all of the text for that item, not one
7 text file per page. The Extracted Text shall be provided in searchable ASCII text format (or
8 Unicode text format if the text is in a foreign language) and shall be named with a unique Bates
9 Number (*e.g.*, the unique Bates Number of the first page of the corresponding production version
10 of the document followed by its file extension). The parties shall make reasonable efforts to
11 extract the text of each ESI item directly from the ESI native file. The parties will make
12 reasonable efforts to provide searchable OCR text for any redacted files.

13 g. Parent-child relationships for all embedded ESI documents (*e.g.*, the
14 association between an attachment and its parent email, or a spreadsheet embedded within a word
15 processing document), must be preserved by assigning sequential Bates numbers to all items
16 within the parent-child group, and identifying those Bates numbers in the relevant ESI metadata
17 and coding fields. For example, if a party is producing an email with embedded attachments, the
18 attachments must be processed and assigned Bates numbers in sequential order, following
19 consecutively behind the parent email. Moreover, parent-child relationships must be included in
20 the metadata as described in Section C(6) below.

21 h. If an original document contains color text, markings or graphics, and the
22 receiving party believes it is necessary to view such document in its original color to understand
23 its full meaning or content, then the receiving party may request that the document be produced
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1 in color format. The producing party shall then reproduce such document(s) and/or ESI in color
2 JPEG format, or in native format.

3 i. If a particular document has a confidentiality designation, the designation
4 shall be stamped on the face of all images pertaining to such document, in the lower left-hand
5 corner of the document, or as close thereto as possible while preserving the underlying image. If
6 the receiving party believes that a confidentiality designation obscures the content of a document,
7 then the receiving party may request that the document be produced with the confidentiality
8 designation in a different position. No party may attach to any filing or any correspondence
9 addressed to the Court, or any adverse or third party, or submit as an exhibit at a deposition or
10 any other judicial proceeding, a copy (whether electronic or otherwise) of any native format
11 document produced by any party without ensuring that the corresponding Bates number and
12 confidentiality legend, as designated by the producing party, appears on the document.

13 4. De-duplication. The parties may de-duplicate their ESI production across custodial
14 and non-custodial data sources after disclosure to the requesting party, and the duplicate custodian
15 information removed during the de-duplication process tracked in a duplicate/other custodian
16 field in the database load file.

17 5. Email Threading. The parties may use analytics technology to identify email
18 threads and need only produce the unique most inclusive copy and related family members and
19 may exclude lesser inclusive copies. Upon reasonable request, the producing party will produce
20 a less inclusive copy.

21 6. Metadata fields. If the requesting party seeks metadata, the parties agree that only
22 the following metadata fields need be produced, and only to the extent it is reasonably accessible
23 and non-privileged: document type; custodian and duplicate custodians (or storage location if no
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1 custodian); author/from; recipient/to, cc and bcc; title/subject; email subject; file name; file size;
2 file extension; file path; date and time created; sent, modified/or date received; hash value; Begin
3 Bates number; End Bates number; Begin Family; End Family The list of metadata type is
4 intended to be flexible and may be changed by agreement of the parties, particularly in light of
5 advances and changes in technology, vendor, and business practices.

6 7. Hard-Copy Documents. If the parties elect to produce hard-copy documents in an
7 electronic format, the production of hard-copy documents will include a cross-reference file that
8 indicates document breaks and sets forth the custodian or custodian/location associated with each
9 produced document. The parties will utilize reasonable best efforts to ensure that paper records
10 for a particular custodian or department level custodian, which are included in a single production,
11 are produced in consecutive Bates stamp order. Hard-copy documents will be scanned using
12 Optical Character Recognition technology and searchable ASCII text files will be produced (or
13 Unicode text format if the text is in a foreign language), unless the producing party can show that
14 the cost would outweigh the usefulness of scanning (for example, when the condition of the paper
15 is not conducive to scanning and will not result in accurate or reasonably useable/searchable ESI).
16 Each file will be named with a unique Bates Number (*e.g.*, the unique Bates Number of the first
17 page of the corresponding production version of the document followed by its file extension).
18 Where necessary and practicable, hard copy documents in color will be scanned in color to ensure
19 full information is communicated in the scanned copy. Where a Document or group of
20 Documents has an identification spine, “post-it note,” or any other label, the information on the
21 label shall be scanned and produced to the extent practicable.

22 **D. Preservation of ESI**

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1 The parties acknowledge that they have a common law obligation, as expressed in Fed. R.
2 Civ. P. 37(e), to take reasonable and proportional steps to preserve discoverable information in
3 the party's possession, custody, or control. With respect to preservation of ESI, the parties agree
4 as follows:

5 1. Absent a showing of good cause by the requesting party, the parties shall not be
6 required to modify the procedures used by them in the ordinary course of business to back-up and
7 archive data; provided, however, that the parties shall preserve all discoverable ESI in their
8 possession, custody, or control.

9 2. The parties will supplement their disclosures in accordance with Fed. R. Civ. P.
10 26(e) with discoverable ESI responsive to a particular discovery request or mandatory disclosure
11 where that data is created after a disclosure or response is made (unless excluded under Sections
12 (D)(3) or (E)(1)-(2)).

13 3. Absent a showing of good cause by the requesting party, the following categories
14 of ESI need not be preserved:

- 15 a. Deleted, slack, fragmented, or other data only accessible by forensics.
- 16 b. Random access memory (RAM), temporary files, or other ephemeral data
17 that are difficult to preserve without disabling the operating system.
- 18 c. On-line access data such as temporary internet files, history, cache,
19 cookies, and the like.
- 20 d. Data in metadata fields that are frequently updated automatically, such as
21 last-opened dates (see also Section (E)(5)).
- 22 e. Back-up data that are duplicative of data that are more accessible
23 elsewhere.
- 24 f. Server, system or network logs.
- 25 g. Data remaining from systems no longer in use that is unintelligible on the
26 systems in use.

- 1 h. Electronic data (*e.g.*, email, calendars, contact data, and notes) sent to or
2 from mobile devices (*e.g.*, iPhone, iPad, Android devices), provided that
3 a copy of all such electronic data is automatically saved in real time
 elsewhere (such as on a server, laptop, desktop computer, or “cloud”
 storage).

4 **E. Privilege**

5 1. A producing party shall create a privilege log of all documents fully withheld from
6 production on the basis of a privilege or protection, unless otherwise agreed or excepted by this
7 Agreement and Order. Privilege logs shall include a unique identification number for each
8 document and the basis for the claim (attorney-client privileged or work-product protection). For
9 ESI, the privilege log may be generated using available metadata, including author/recipient or
10 to/from/cc/bcc names; the subject matter or title; and date. Should the available metadata provide
11 insufficient information for the purpose of evaluating the privilege claim asserted, the producing
12 party shall include such additional information as required by the Federal Rules of Civil
13 Procedure. Privilege logs will be produced to all other parties no later than 30 days after delivering
14 a production.

15 2. Redactions will be logged, clearly stating the basis for the redaction.

16 3. With respect to privileged or work-product information generated after the filing
17 of the complaint, parties are not required to include any such information in privilege logs.

18 4. Activities undertaken in compliance with the duty to preserve information are
19 protected from disclosure and discovery under Fed. R. Civ. P. 26(b)(3)(A) and (B).

20 5. Pursuant to Fed. R. Evid. 502(d), the production of any documents in this
21 proceeding shall not, for the purposes of this proceeding or any other federal or state proceeding,
22 constitute a waiver by the producing party of any privilege applicable to those documents,
23 including the attorney-client privilege, attorney work-product protection, or any other privilege
24 or protection recognized by law. Information produced in discovery that is protected as privileged

1 or work product shall be immediately returned to the producing party, and its production shall not
2 constitute a waiver of such protection.

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5 IT IS SO STIPULATED, THROUGH COUNSEL OF RECORD.

6 DATED: 12/2/2021

DISABILITY RIGHTS WASHINGTON

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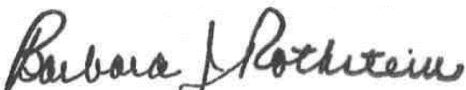
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ORDER

Based on the foregoing, IT IS SO ORDERED.

DATED this 16th day of December, 2021.



BARBARA J. ROTHSTEIN
UNITED STATES DISTRICT JUDGE